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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 270

CECIL W. ARMSTRONG AND MARIE I. ARMSTRONG, CO-PARTNERS DOING BUSINESS AS ARMSTRONG PRODUCTS COMPANY; BALTIMORE COPPER PAINT CO., A DIVISION OF OLIVER REEDER AND SON, INC.; ORRIN F. BENNER, DOING BUSINESS AS THOMASTON STEEL WORKS, et al, *Petitioners,*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR THE PETITIONERS

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BRIEF FOR THE PETITIONERS

THE OPINION BELOW

The Opinion of the United States Court of Claims in *Cecil W. Armstrong, et al* v. *The United States,* No. 532-56, was rendered January 14, 1959 and is reported in 169 Federal Supplement 259. The Opinion is also set forth in the printed Transcript of Record herein at pages 18-24.

JURISDICTION

The judgment of the court below was entered on January 14, 1959 (R. 18) and petitioners' motion for rehearing was denied on May 13, 1959 without opinion (R. 25). Jurisdiction is conferred on this Court by Sec. 1255, Title 28, United States Code. Petition for a Writ of Certiorari was granted October 12, 1959 (R. 60).

STATUTES AND REGULATIONS RELIED ON

1. Constitution of the United States, Amendment 5:

> * * *; nor shall private property be taken for public use, without just compensation.

2. Section 43, Chapter 178, Revised Statutes of the State of Maine, 1954:

> Whoever furnishes labor or materials for building a vessel has a lien on it therefor, which may be enforced by attachment thereof within 4 days after it is launched; but if the labor and materials have been so furnished by virtue of a contract not fully completed at the time of launching of the vessel, the lien may be enforced within 4 days after such contract has been completed. He also has a lien on the materials furnished before they become part of the vessel, which may be enforced by attachment; and the owners of any dry dock or marine railway used for any vessel have a lien on said vessel for the use of said dock or railway, to be enforced by attachment within 4 days after the last day in which the same is used or occupied by said vessel.

3. Armed Services Procurement Regulation, Section 8-707 (as revised to September 5, 1958) 32 C.F.R. 8.707:

8-707 Default Clause for Fixed-Price Supply Contracts. The following clause shall be used in all fixed-price supply contracts as defined in ASPR 7-102.

DEFAULT

(a) The Government may, subject to the provisions of paragraph (c) below, by written notice of default to the Contractor, terminate the whole or any part of this contract in any one of the following circumstances:

(i) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

(ii) if the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, . . .

* * *

(d) If this contract is terminated as provided in paragraph (a) of this clause, the Government, in addition to any other rights provided in this clause, may require the Contractor to transfer title and deliver to the Government, in the manner and to the extent directed by the Contracting Officer, (i) any completed supplies, and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing materials") as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; and the Contractor shall, upon direction of the Contracting Officer, protect and preserve property in possession of the Contractor in which the Government has an interest. Payment for com-

pleted supplies delivered to and accepted by the Government shall be at the contract price. Payment for manufacturing materials delivered to and accepted by the Government and for the protection and preservation of property shall be in an amount agreed upon by the Contractor and Contracting Officer; failure to agree to such amount shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Dispute."

QUESTIONS PRESENTED

1. Does the option given to the Government in the standard "Default" clause of a Government supply contract (in the event of a default termination of the contract) to "require the Contractor to transfer title and deliver to the Government" any completed supplies, partially completed supplies and manufacturing materials which the contractor has specifically produced or acquired for the performance of the contract give the Government "inchoate title" to all such items (before default) automatically upon their acquisition by the contractor?

2. Assuming *arguendo* that the Government acquires "inchoate title" to materials purchased by the contractor from suppliers upon delivery of the same to the contractor, does this "inchoate title" prevent suppliers from acquiring liens (in accordance with the laws of the State of Maine) on these materials at the time of delivery of the materials to the contractor?

3. Assuming *arguendo* that liens are acquired by suppliers (in accordance with the laws of the State of Maine) on materials furnished to the contractor upon delivery, are the liens of the suppliers superior to the Government's "inchoate title"?

4. Where the Government enters into a supply contract for the purchase by it of small boats, are said boats a "public work", when the said contract (a) provides for title to remain in the contractor during construction and until acceptance by the Government, (b) provides for the Government to have a lien on the said boats to the extent of any moneys it might advance, (c) requires the contractor to immediately discharge liens, and if the contractor fails to discharge said liens, gives the Government the privilege of discharging them at the contractor's expense, (b) makes no provision for payment or completion bonds and (e) grants the Government an option in the event of a default termination of the contract to require the contractor to transfer title to the Government to completed boats, uncompleted boats and manufacturing materials?

5. When the Government acquires title to boats and materials, (situated in the State of Maine) on which there are liens and removes the said boats and materials to other states and effectively destroys the identity of the property and the right of the lienors to enforce their liens, has the Government "taken" the liens within the purview of the Fifth Amendment entitling the lien creditors to just compensation?

STATEMENT OF THE CASE

The twenty-seven petitioners, suppliers and materia men under a contract executed by the Department o the Navy and Rice Shipbuilding Corporation of East Boothbay, Maine, hereinafter called "Rice", brought this action to recover just compensation under the Fifth Amendment to the Constitution for property rights effectively and completely taken from them by the Government (Petition, R. 1-5). Both the peti-

tioners and the Government moved for summary judgment on the basis of the pleadings and papers filed in conjunction with their motions (R. 9, 13). The Government's motion was granted and that of the petitioners denied.

Under date of March 26, 1954, the Department of the Navy awarded contract NObs-3572 to Rice to supply eleven 40-foot personnel boats which were to be constructed at Rice's plant at East Boothbay, Maine (Dft. Ex. A, R. 27, *et seq.*). Rice was unable to complete the construction of the eleven boats, and on August 2, 1955, the Government terminated the contract for default (Deft. Ex. B, R. 47-49). On August 4, 1955, pursuant to the demand of the Government's Contracting Officer, Rice executed the "Instrument of Transfer of Title under Contract NObs-3572," which had been prepared and submitted to it by the Government (Dft. Ex. C, R. 49-51). This instrument, which contained a detailed itemized list of all of the materials, supplies and hulls in the possession or control of Rice, incorporated or to be incorporated into the subject boats, transferred legal title to the same to the Government.[1] Subsequently, the Government took possession of the materials, supplies and hulls and removed them from the State of Maine to its own yards in various other states (R. 10-12). Rice was subsequently adjudicated a bankrupt and the Government filed claim in the Bankruptcy Court for its alleged costs of completing the boats (Dft. Ex. H, R. 59).

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[1] Exhibit A to the "Instrument of Transfer of Title Under Contract NObs-3572" (not printed in the record) consists of a 23-page list of materials including the hulls of ten boats, in varying stages of completion, and lumber and marine hardware ranging from nuts, bolts and screws to rudders (Dft. Ex. C).

In acquiring title to the supplies and materials, the Government purported to act in accordance with Section 11(d) of the Default clause of the contract, which provided in part as follows (Dft. Ex. A, R. 42):

> (d) If this contract is terminated . . . the Government . . . may require the Contractor to transfer title and deliver to the Government, in the manner and to the extent directed by the Contracting Officer, (i) any completed supplies, and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information and contract rights (hereinafter called "manufacturing materials") as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as had been terminated; * * *

During the performance of its contract, Rice received from the Government various progress payments aggregating $141,387.20 (R. 11). The amount paid by the Government was based, in accordance with the terms of the contract, upon the percentage of completion of the contract less a retained reserve of 3% (R. 11, 35, 55). Rice's incurred costs in performing the contract, as of April 11, 1955, totalled $198,335.23 (R. 58).

Pursuant to the terms of the Progress Payments and Liens clause of the contract, the Government acquired a lien on the work in process solely to the extent of the progress payments it had made (R. 35-36). The Government did not enforce its lien by foreclosure, but instead exercised its option under the Default clause by requiring Rice to execute the said "Instrument of Transfer of Title Under Contract NObs-3572" (R. 47-51).

Each of the petitioners had furnished supplies, materials and equipment to Rice for use in the construction of the said boats (R. 14-15). Pursuant to the provisions of Section 13, Chapter 178, of the Revised Statutes of Maine, 1954 (*supra*, p. 2), each petitioner had a good and valid lien on the said boats and hulls, and on the materials and supplies furnished by each petitioner on the date of the transfer of title and possession of said hulls, materials and supplies to the Government. The petitioners have not been paid by Rice nor the Government, and there were no assets in the bankrupt estate with which to pay their claims (R. 16-17).

The contract contained a Discharge of Liens clause (R. 37) requiring the contractor to immediately discharge all liens except those in favor of the Government, failing which

> "the Government may discharge or cause to be discharged said lien or right *in rem* at the expense of the Contractor."

The petitioners alleged a "taking" by the Government of their property rights, that is, the right to enforce their liens, when the Government obtained title to the partially completed vessels and manufacturing materials, removed them from the State of Maine, and effectively destroyed their identity. In granting the respondent's motion for summary judgment, the court below erroneously held that the petitioners did not have liens on the property in question because the project was a "public work" (R. 24).

The court below, relying on the Default clause, held that "the contract provided the Government with inchoate title to the various materials supplied the contractor by petitioners," and for this reason, the peti-

tioners could not acquire a lien against the subject property, and thus had no property rights that were "taken" (R. 24).

SUMMARY OF ARGUMENT

I. The contract between the Government and Rice contains clear and unequivocal language establishing that it was the intention of the parties that the Government would not acquire title to the boats which were the subject of the contract until their delivery by Rice and their acceptance by the Government. The provision of the contract which gave the Government an option, in the event of termination of the contract for default, to require Rice to transfer to it title and possession of the uncompleted boats and materials did not give the Government "inchoate title" nor did it make the subject boats "public works". The decision of the court below that such clause prevented the petitioners from acquiring liens because of the Government's so-called "inchoate title" is in conflict with the decision in *United States* v. *Ansonia Brass & Copper Co.*, 218 U.S. 452. The term "inchoate title" is uncertain in meaning and its introduction into the law of federal contracts creates a host of problems affecting the legal relationships of all who contract with the Government. The court below had no statutory authority or precedent for the concept of "inchoate title", and its application to the instant case was unwarranted by the terms of the contract or any factual or equitable considerations.

II. The legal title to the uncompleted boats and materials was in Rice prior to the transfer of title and possession by Rice to the Government. Under Maine law, the petitioners, having supplied materials for the

building of vessels, acquired liens when they furnished the materials. Since the delivery of materials was a prerequisite to the Government making progress payments, the petitioners' liens were acquired prior to the time the Government acquired any liens and were encumbrances on the property when Rice executed the "Instrument of Transfer of Title . . .".

III. The lien of the Government for progress payments it made to Rice was merged with its title when the Government acquired title, since the Government exercised its option to acquire title under the provisions of the Default clause. Petitioners' liens, not having been extinguished, became paramount.

IV. When the Government acquired title to the partially completed boats and materials and removed them from the State of Maine, it destroyed the petitioners' rights to enforce their liens. The Government's option, contained in the Default clause, to acquire title did not affect the right of the petitioners to enforce their liens. The destruction of the petitioners' liens constituted a "taking" entitling the petitioners to just compensation under the Fifth Amendment to the Constitution.

ARGUMENT

I. NEITHER LEGAL TITLE NOR "INCHOATE TITLE" TO THE MATERIALS ACQUIRED BY RICE FROM THE PETITIONERS FOR PERFORMANCE OF ITS CONTRACT WITH THE GOVERNMENT WAS IN THE GOVERNMENT PRIOR TO THE EXECUTION OF THE INSTRUMENT OF TRANSFER OF TITLE BY RICE

The contract between Rice and the Government provided for delivery of the subject boats to various naval installations with acceptance "At Point of Delivery" (R. 27, 28-30). The Government had the right to perform trials after delivery and "prior to preliminary

acceptance" to determine if the boats had been damaged during shipment (R. 32). The contract also provided for final acceptance of the boats after a guarantee period of six months from the date of preliminary acceptance of the boats (R. 38). The inspection clause of the contract gave the Government the right to reject defective supplies at any time prior to final acceptance and thereafter, only if fraud was involved (R. 38, Final Acceptance clause; R. 40, Inspection clause (d)). The contract also had a provision (Responsibilities for Supplies clause, R. 41) which made the contractor responsible for all supplies until delivered to the Government and required the contractor to bear the risk as to rejected supplies.

The aforementioned clauses speak for themselves and establish the intention of the parties to the contract that the title to all materials and to the completed supplies, in the minimum, were in the contractor at all times prior to delivery and preliminary acceptance of the boats. While final acceptance was not to take place until after the expiration of a guaranty period of six months after preliminary acceptance, there was no requirement for the contractor to carry insurance for the benefit of the Government after the preliminary acceptance (R. 36). In any event, if title did not pass at the time of preliminary acceptance, it did pass at the time of final acceptance.

The only other way specified in the contract for the Government to acquire title, was the exercise by the Government of its option after a default termination to "require" the contractor to transfer title. This option was contained in the provisions of the Default clause, that in the event of a termination for default (Clause 11(d), R. 42):

> "the Government . . . may require the Contractor to transfer title and deliver to the Government . . . (i) any completed supplies, and (ii) . . . [manufacturing materials]."

The intention of the parties that title was to remain in the contractor is also evident from the language of the Progress Payments and Liens clause which provided in part (R. 36):

> "(b) Any and all progress payments made hereunder shall be secured, when made, by a lien in favor of the Government upon the vessels, articles, and things contracted for on account of all payments so made and on all material, equipment and other property acquired for or allocated to the performance of this contract, except to the extent that the Government, by virtue of any other provision of this contract, or otherwise, shall have valid title to such articles, things, materials, or other property as against other creditors of the contractor. If such property is not identified by marking or segregation, the Government shall be deemed to have a lien upon a proportionate part of any mass of property with which such property is commingled. Any lien provided for by virtue of this Section is paramount to all other liens under the provisions of an Act approved August 22, 1911 (Pub. No. 41, 62nd Cong.; 37 Stat. 32; 34 U.S.C. sec. 582)."

The contract further provided, under the provision entitled "Discharge of Liens" (R. 37):

> "The Contractor shall immediately discharge or cause to be discharged any lien or right *in rem* of any kind, other than a (sic) favor of the Government, which at any time exists or arises with respect to the boats, and machinery, fittings, equipment or materials for the boats. If any such lien or right *in rem* is not immediately discharged, the

> Government may discharge or cause to be discharged said lien or right *in rem* at the expense of the Contractor."

The fact that the Government was provided with a lien to secure any progress payments it might make was clear recognition that the Government did not have title to the materials acquired by the contractor. An owner cannot have a lien on his own property. *Litchfield* v. *Ballou*, 114 U.S. 190, 195; *Gould* v. *Day*, 94 U.S. 405, 413. The presence in the contract of a discharge of liens clause was in anticipation of the possibility that liens might be acquired by third parties against the boats and materials, a right which would not exist if the Government had title to them. *United States* v. *Ansonia Brass & Copper Co.*, 218 U.S. 452, 471.

The contract also required Rice to provide insurance for the benefit of the Government "until each boat has been preliminarily accepted", but only to the extent of the

> ". . . aggregate of the amounts paid to the Contractor under this contract by the Department plus the value of any materials, equipment and appliances furnished by the Government . . . . Loss under the aforementioned insurance shall be payable to . . . [the Government] to the extent of payments made to the Contractor under this contract plus the amount of loss of or damage to the material . . . furnished by the Government and for use of the Contractor to the extent of any remaining balance. . . ." (R. 36-37).

It is thus clear that in the event of destruction of all or part of the subject property, the Government's interest in the proceeds of the insurance was limited to the

extent of progress payments made by it and to the value of any Government-furnished property. Obviously, these limitations would not have been included had the Government had a title interest in all boats and materials in the contractor's possession, the conclusion reached by the court below.

In addition to the clearly expressed intention of the contract that title was to remain in Rice until the happening of certain events, (1) delivery and acceptance of the boats, or (2) a transfer of title upon the Government's request after a default termination, the action by the Government in requiring the contractor to execute an "Instrument of Transfer of Title . . ." when it terminated the contract (R. 47-49) is proof positive that the Government did not consider that the contract gave it any form of title. Clearly, if the Government had title to the manufacturing materials as they were acquired by Rice, it would not have been necessary for it to require Rice to execute an instrument transferring to the Government "all of the Transferor's right, title and interest in and to said manufacturing materials" (R. 50).

The question of title to vessels under construction for the Government and the materials therefor was the subject of this Court's decision in *United States* v. *Ansonia Brass & Copper Co., supra*, which decision is completely dispositive of both the question of title and of the right of petitioners herein to acquire their liens on the boats and materials. The case involved three contracts for the construction of vessels for the Government and the relative rights of the United States and others claiming liens on such vessels. The contracts were respectively for the construction of the dredge Benyuard for the War Department, the revenue cutter

Mohawk for the Treasury Department and the cruiser Galveston for the Navy Department. The creditors asserting liens under the supply-lien law of Virginia had secured the appointment of a receiver in a state court in Virginia to take possession of the property of the contractor including the three vessels. As to the three vessels and the materials therefor, the Supreme Court of Appeals of Virginia had held the creditors' liens superior to the lien or claim of the United States.

This Court reviewed the judgment of the state court. After considering the partial payment clause in the Benyuard contract, this Court concluded that under that clause "parts paid for are to become the sole property of the United States" (at p. 467). This Court held:

> "We are now dealing with the right of a State to provide for such liens while property to the chattel in process of construction remains in the builder, who may be constructing the same with a view to transferring title therein to the United States upon its acceptance under a contract with the Government. We are now treating of property which the United States owns." (At p. 471.)

The Court concluded that as to the Benyuard a state lien could not be impressed upon Government property.

Turning then to the other two vessels, the Court said:

> "In the case of the Mohawk there is no such stipulation as to passing of the title on partial payments in the progress of the work as is found in the contract for the Benyuard. The Secretary of the Treasury was, in his discretion, to make partial payments under the contract during the progress of the work. . . . and a lien was reserved for such payments. . . ." (At p. 472.)

* * *

"The case of the Galveston is controlled by the same principles. In that contract there was no provision for taking title to the vessel; on the contrary, it was stipulated that on certain conditions the title should vest in the United States as collateral security, and the eighteenth clause of the contract provides for the release of liens before partial payments shall be required. This clause . . . reads:

'When a payment is to be made under this contract, as a condition precedent thereto, the Secretary of the Navy may, in his discretion, require, for the protection of the party of the second part, evidence satisfactory to him, to be furnished by the party of the first part; that no liens or rights *in rem* of any kind against said vessel, or her machinery, fittings, or equipment, or the material on hand for use in the construction thereof, have been or can be acquired for or on account of any work done or any machinery, fitting, equipment or material already incorporated as a part of said vessel, or on hand for that purpose, or that such liens or rights have either been released absolutely, or so subordinated to the rights of the Government as to make its lien for all payments paramount, so as not to encumber or hinder in any way the right of the Government to accept or reject said vessel, and so as to become absolutely extinguished in case of acceptance of the vessel.'

"The effect which we give this provision is strengthened by the opinion rendered to the Secretary of the Navy by the Attorney General, that in his opinion the practice of the Navy Department in making such contracts recognized that liens of this class might be acquired on vessels where there was no provision in the contract for the vesting of title in the same in the United States. 23 Op. Atty. Gen. 174, 176.

> "We think that this contract, as the one for the Mohawk was made in recognition of the rights of those who should furnish work or material for the vessel to secure their claims by liens which it was made the duty of the contractor to provide for in order to protect the title of the United States." (p. 474-475.)[2]

While this Court in considering the Galveston contract did not expand upon its statement that title might vest in the Government under certain conditions, "as collateral security", a reading of that contract, set forth in Vol. 61, Transcripts of Records and File Copies of Briefs, October Term, 1910, Case No. 458, indicates the Court apparently had reference to Clause Thirteenth (p. 237-8 of that Record). That clause provided that in the event of termination of the contract the Secretary of the Navy might complete the vessel using materials on hand in which event

> "title to said vessel, or so much thereof as shall have been completed, and to all such materials shall forthwith vest in the party of the second part [Government]; and . . . [the contractor] will surrender said vessel and all materials on hand."

[2] In the cited opinion of the Attorney General, he had stated:

"I assume it to be correct to say that if a State law authorized a lien for labor or materials furnished in the construction of a vessel under this form of contract, it would not be void or unenforcible because the vessel was in process of construction for the United States, the property to the same not yet having passed to the Government, and such liens could therefore be effectively enforced. The clause of the contract referred to making it optional with the Secretary of the Navy to require evidence that no liens or rights *in rem* of any kind exist against said vessel imports that such is the opinion of the Navy Department."

The Rice contract had a comparable clause (Clause 11(d), R. 42) which provided the Government with an option, in the event of termination for default, to require Rice to "transfer title and deliver to the Government . . . completed supplies, and . . . manufacturing materials".

It is to be noted that the "release of liens" clause in the Galveston contract (as quoted at p. 16, *supra*) is comparable to the Discharge of Liens clause in the Rice contract (R. 37). This Court's decision, with respect to the Galveston and Mohawk contracts, was that suppliers could acquire liens upon vessels and materials to which the Government had not yet acquired title. The court below concluded that this aspect of the *Ansonia* decision was not a precedent in the instant case because Clause 11(d) (R. 42) of the Default clause gave the Government a title position which it did not have in the Galveston and Mohawk contracts. The court below apparently was not aware of the fact that the Galveston contract had a clause comparable to the Default clause and thus reached an improper conclusion.

It is significant that in the year 1911, in apparent recognition of the holding of this Court in the *Ansonia* case, legislation was enacted making the Government's liens for partial payments made by the Navy paramount to all other liens, Act of August 22, 1911, Ch. 42, 37 Stat. 32; 34 U.S.C. 582, as codified 10 U.S.C. 7521, August 10, 1956. Obviously, the legislation was enacted (1) in recognition of the fact that liens could be acquired on property being constructed for the Government, but on which property the Government did not have title, (2) to permit the Navy, if it wished, to make progress payments, and when so doing to protect itself

to the extent of the moneys advanced by it, by giving it a paramount lien to the extent of the moneys so advanced. This statutory provision is cited in the Progress Payments and Liens clause of the Rice contract (R. 36). Since it is well established that liens may not be filed against Government property, the need to provide for the paramountcy of Government liens would only be present if the Government did not have title.

It is obvious from the contract language and the conduct of the parties that they intended that the legal title to all materials, supplies and hulls was to remain in Rice until delivery and acceptance or until transfer of title pursuant to the Default clause.

The court below was also in error in concluding that the subject matter of the Rice contract involved a "public work". In *Title Guaranty & Trust Co.* v. *Crane Co.*, 219 U.S. 24, 33 Mr. Justice Holmes, speaking for the Court, stated:

> "Whether a work is public or not does not depend on its being attached to the soil; if it belongs to the representatives of the public, it is public . . ."

In that case, title was in the Government and therefore, a public work was involved.

The rule so succinctly stated by Mr. Justice Holmes was applied by the court in *United States for use of Mengel Body Co.* v. *Metropolitan Body Co.*, 79 F.2d 177, 178 (CCA-2, 1935). The court stated the facts and the applicable rule in the following language:

> "The use plaintiffs and interveners all furnished materials to the Metropolitan Body Company which went into the construction of the mail truck bodies and for which they have not been paid. Their case is based upon the claim that the con-

tract between the government and the Metropolitan Body Company was for the construction of 'a public work within the meaning of' . . . the Heard Act . . . so that the condition of the above-mentioned bond gave to them the security of the bond for the collection of payment for the materials they furnished.

* * *

"These mail truck bodies were at the risk of the builder and were its property during all the time they were being built. Not until they were completed, delivered f.o.b. cars at Bridgeport, Conn., and accepted by the government, did they become the property of the public. Before that the materials furnished had been built into the private property of the contractor which was as available for subjection to the satisfaction of the claims of these use plaintiffs and intervenors as any property of the debtor. When delivered and thereafter, the contractor's work was done and they were the property of the government without ever having been a public work.

"Granting that the bodies were a 'work' while work was being done upon them, the test laid down in the Title Guaranty & Trust Co. v. Crane Co., supra, made them a private work during that period. In this respect they differed from other property the government might buy only in that they were made to special order. * * *".

The Attorney General of the United States, citing the *Title Guaranty* and *Mengel Body* cases as authority, has interpreted the phrase "public work" as including only work on vessels belonging to the United States or work on vessels under contract that "provide for passage of title to the United States during the progress of the work as partial payments are made". 38 Op. Atty. Gen. 418, 421 (1936). See also *Maiatico*

Construction Co. v. *United States to use of Phelps, et al.*, 79 F.2d 418, 420 (C.A., D.C., 1935).

It was only by ignoring these precedents and the very clear language of the contract that the court below was able to reach its erroneous conclusion that the subject contract involved a "public work". There is no precedent for the lower court's opinion in this regard and indeed the court's opinion, if correct, results in the subject matter of practically every Government supply contract being a "public work", because they all generally include the standard "Default" clause which is contained in the instant case (Armed Services Procurement Regulation, Sec. 8-707; quoted pp. 2-4, *supra*).

The court below cited no precedent for its decision that the Government had "inchoate title" in the materials in the possession of Rice nor did it define the precise meaning or scope of the term. The phrase "inchoate title", has been used by this Court with reference to real property to describe the interest of one who has been granted land by the sovereign prior to the perfection of title by issuance of a patent or other actual instrument of conveyance. ". . . inchoate title to lands is property." *Delassus* v. *United States*, 9 Pet. 117, 133; *Rogers Locomotive Machine Works* v. *American Emigrant Co.*, 164 U.S. 559; *Chapman & Dewey* v. *St. Francis Levee District*, 232 U.S. 186, 198; *Little* v. *Williams*, 231 U.S. 335, 340; *Work* v. *Louisiana*, 269 U.S. 250, 255. In *Budd* v. *Gallier*, 50 Ore. 42; 45, 89 P. 638, 639 (1907), "Inchoate legal title" was defined as that title held by a purchaser of public land who had complied with all provisions of law required of him but had not received the formal document of title; he cannot be deprived thereof except for fraud or mistake. Our research did not disclose any

instance in which the term has been previously applied to personal property. Further, there does not appear to be an equitable reason under the circumstances for creating such a precedent.

Assuming, *arguendo*, that there is or should be such a concept as "inchoate title" as applied to personal property, the instant situation still does not lend itself to the application of the term. The term "inchoate title" suggests a title which requires steps to perfect but is otherwise complete. In short, the acquisition of legal title is of certain occurrence, but *in futuro*.

The Default clause required a series of steps to be taken before the Government acquired title; (1) a termination of the contract for default; (2) a decision by the Government to acquire title; (3) a demand that title be transferred; and (4) a transfer of title. As a condition precedent to the Government's acquisition of title under the Default clause, the contractor had to be in default and it was only upon the happening of that condition that the Government's option to acquire title came into effect. At that point the Government must decide whether it wishes to exercise the option and to take title. There are many instances in which the Government, for practical reasons, does not exercise the option, for the option carries with it the obligation upon the part of the Government to pay for the materials acquired by virtue of the exercise of the option.[3]

[3] Section 11 (d), the Default clause, provided in part (R. 42-43):

"The Government shall pay to the Contractor . . . the amount agreed upon by the Contractor and the Contracting Officer for manufacturing materials delivered to and accepted by the Government . . . Failure to agree shall be a dispute . . . within the meaning of the clause of this contract entitled 'Disputes'".

Assuming, *arguendo*, that the Government does have "inchoate title" to materials acquired by its contractors, it does not necessarily follow that this is the type of Government title which would preclude the filing of liens. If it were otherwise, there would be no necessity to provide for the Government to have a *paramount* lien for partial payments and no need to have a contract provision for the discharge of liens against the boats and materials. It is well established that an interpretation which gives a reasonable meaning to all provisions of a contract is preferable to one which leaves a portion of the writing useless and inexplicable. *Merrill-Rickgaber Co.* v. *United States*, 241 U.S. 387, 392; III Williston on Contracts (Rev. Ed.) sec. 619. It becomes apparent then, that in the contemplation of the parties when they entered into the contract, the interest of the Government in the boats and materials, whether it be designated "inchoate title" or any other name, was not of such nature as to preclude the petitioners acquiring liens thereon. It is a matter of elementary justice that the rights and remedies of lien creditors should not be cut off in the absence of a clear, legislative intent to do so.

The Default clause is standard in most Government contracts (Armed Services Procurement Regulations, Sec. 8-707, 32 C.F.R. 8.707, see pp. 2-4, *supra*) and the decision below on the issue of "inchoate title" will have substantial and far-reaching effects on all who contract with the Government, their suppliers, subcontractors, creditors, sureties and financing institutions. If, as the court below held, the language of the Default clause clothes the Government with "inchoate title" to materials acquired by its contractors, as soon as the materials come into the contractors' possession, anyone

dealing with a Government contractor would be doing so at his peril.[1] The situation would be particularly acute for a contractor who undertakes to supply commercial items he regularly manufactures to the Government. How would it be possible to determine what portion of his inventory of supplies would be subject to the Government's "inchoate title"? The question also arises as to when the Government's "inchoate title" becomes effective, if the contractor has a stock of parts, which may be used interchangeably for Government production and commercial production? If the manufacturer uses a portion of his inventory for his commercial production after being awarded a Government contract, is such action a conversion of Government property because of the Government's "inchoate title"? What are the rights of an attaching creditor, a secured creditor, a surety or an assignee with respect to these parts on which the Government has "inchoate title"? What is the status of a financial institution which made a loan to the contractor on the strength of its inventory statement?

This Court has been faced several times in recent years with the question of the right of the states, counties and municipalities to levy personal property and similar taxes upon property in the possession of Government contractors. Cf. *Detroit* v. *Murray Corp.*,

[1] "The magnitude of Government contracting was noted by Congressman F. Edward Hebert, in a recent Congressional hearing: 'In fiscal years 1957 and 1958, the Government entered into 7,837,000 contracts costing $41 billion.'" Inquiry into the Administration and Operation of the Armed Services Board of Contract Appeals, Hearing before the Subcommittee for Special Investigations of the Committee on Armed Services, House of Representatives, 85th Congress, 2nd Session, Hearing held December 4, 1958, p. 791.

355 U.S. 489, and the cases discussed therein. The introduction of the concept of "inchoate title" in the Government raises a host of new problems as to the power of the states to tax property.

The concept that the Government has "inchoate title" is implausible when it is considered that the Default clause entitles the Government to acquire from the contractor not only supplies and materials, but also "tools, dies, jigs, fixtures, plans, drawings, information and contract rights". While not pertinent to the issues herein, the "inchoate title" concept when applied to the tools, etc. used by a contractor raises another host of problems.

The practical difficulties resulting from the interpretation of the court below of section (d) of the standard Default clause found in Government supply contracts are manifold and enormous. The interpretation is contrary to this Court's views as expressed in the *Ansonia* case, *supra* (at p. 474). It is in accord with neither precedent, practicality, equity nor logic and to serve the ends of justice must be set aside.

The conclusion is inescapable from the terms of the subject contract and the surrounding circumstances that the title to the supplies and materials was in Rice, subject only to outstanding liens of the petitioners and the Government from the time Rice acquired them until Rice executed an Instrument of Transfer of Title. At that time, and not before, did title repose in the Government.

II. THE PETITIONERS HAD GOOD AND VALID LIENS UPON THE PROPERTY WHEN THE GOVERNMENT TOOK POSSESSION OF THE SAME

Section 13, Chapter 178 of the Revised Statutes of Maine, 1954, set forth at p. 2, *supra*, provides a supplier of labor or materials for building a vessel with a lien on the vessel and on the materials furnished before they become part of the vessel. The lien is enforceable by attachment brought within four days after launching of the vessel. The lien attaches to material furnished even though the material never became part of the vessel, if the parties contemplated that it was furnished to become part of a vessel. *Mehan* v. *Thompson*, 71 Me. 492 (1880).

The petitioners' liens became effective when they furnished Rice with the materials for use on the subject contract. The lien of the Government did not arise until progress payments were made, applying only to materials owned by the contractor. Since the acquisition of title to the supplies and materials by Rice was a prerequisite to an application by Rice for a progress payment, as a practical matter, the liens of the petitioners for the value of materials and services furnished by them to Rice, attached to the materials prior to the time the Government acquired its liens. Further, the Government's liens were limited to the amount of the funds which it advanced for progress payments. The Progress Payments and Liens clause provided, in effect, for partial payments based upon the percentage of completion of performance of the contract less a reserve of 3% (R. 35). Thus Rice, by April 11, 1955, had incurred costs of $198,335.23 (R. 58), but based upon a percentage of completion it became entitled to

partial payments of $141,387.20, which represented $145,760.00 earned, less a 3% reserve.[2]

The progress payments made by the Navy were not based upon Rice's costs but upon the Navy Inspector's estimate of the percentage of completion when applied to the contract price. Thus, if Rice had underbid by 50%, the Navy would make progress payments only to the extent of 50% of actual costs. Based upon the progress payments made to Rice, Rice had completed at least 82% of the contract at the time it defaulted. There is no relationship between the value of the partially completed vessels and materials taken by the Government and the amount of progress payments made to Rice by the Government. The Government had a lien on partially completed vessels and materials having a cost of at least $198,545.23 although it only advanced the sum of $141,387.20. Thus, at the time the Goverment took title, Rice had an equity in the subject materials amounting to at least $57,158.03. If the Government had enforced its lien rights rather than exercising its right to acquire title under the Default clause, any surplus available after the satisfaction of the Government's claim would have been available to the petitioners.

The decision of the court below dismissed a consideration of the statutory Maine lien by citing *United States* v. *Allegheny County*, 322 U.S. 174 as authority for the principle that Federal and not state law governs the construction of Federal contracts (R. 21). A reading of the *Allegheny* decision (at p. 183), makes it clear that this Court was, in effect, saying that where

[2] Additional materials were received and additional work was performed by Rice after April 11, 1955.

a conflict existed between state and Federal law as to the exercise of a constitutional function, Federal law would be controlling.

In *United States* v. *Standard Rice*, 323 U.S. 106, 111, this Court stated:

> "Although there will be exceptions, in general the United States as a contractor must be treated as other contractors under analogous situations. When problems of the interpretation of its contracts arise the law of contracts governs. *Hollerbach* v. *United States*, 233 U.S. 165, 171-172; *United States* v. *Bethlehem Steel Corp.*, 315 U.S. 289, 298-299. We will treat it like any other contractor and not revise the contract which it draws on the ground that a more prudent one might have been made *United States* v. *American Surety Co.*, 322 U.S. 96."

As between Rice and the petitioners, Maine law was applicable to the question of petitioners' lien rights. *Erie R. R.* v. *Tompkins*, 304 U.S. 64. There is no question of construction of the subject contract which creates a conflict between the Federal and Maine law. To the contrary, the contract by its terms recognized the possibility that such liens might arise and provided for their discharge (Discharge of Liens clause, R. 37) and for their subordination to the Government's liens for partial payments (R. 36).

Further, the cases cited by the court below in support of the proposition that laborers and materialmen can acquire no lien upon a Government public work (*United States* v. *Munsey Trust Co.*, 332 U.S. 234, 241; *Equitable Surety Co.* v. *McMillan*, 234 U.S. 448, 455; *Hill* v. *American Surety Company*, 200 U.S. 197, 203) are not applicable because the subject matter of this contract was not public work.

We have previously pointed out that the *Ansonia* decision, *supra*, recognized that state liens might attach to property being built for the Government when the Government does not have title but could not attach to property in which the Government had title (*supra*, pp. 15-17). We have also noted that Congress did not bar state liens against property upon which partial payments are made but merely made the Government's lien paramount (*supra*, p. 18). The conclusion reached by the court below that the petitioners could not acquire liens is not supported by the contract, by statute, by precedent nor by any equitable considerations.

The petitioners' liens were valid under Maine law and were in force and were encumbrances on the property at the time Rice executed the "Instrument of Transfer of Title . . .".

III. IF THE GOVERNMENT HAD A PARAMOUNT LIEN, ITS LIEN WAS MERGED WITH ITS TITLE WHEN IT ACQUIRED TITLE

After termination of the subject contract for default, the Government directed Rice to transfer to it title to the partially completed vessels and all materials acquired for use in connection with the subject contract in accordance with the provisions of Clause 11(d) of the Default clause (R. 48-49). This clause provided that in the event of termination of the contract for default:

> "the Government . . . may require the Contractor to transfer title and deliver to the Government . . . (i) any completed supplies, and (ii) such partially completed supplies and . . . [manufacturing materials] as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; . . .". (R. 42).

Pursuant to the Government's request, Rice executed an "Instrument of Transfer of Title under Contract NObs 3572" (R. 49-51). This instrument effectively transferred to the Government title to all partially completed vessels, materials and supplies which were the subject of the petitioners' liens. It is obvious that Rice could not and did not transfer title to the Government free and clear of the petitioners' liens. The petitioners' liens were not satisfied nor were they extinguished by any legal proceeding.

Upon the acquisition of title to the partially completed vessels and materials by the Government, its liens (arising by virtue of the progress payments made to Rice) merged with its title. It is well established that a person cannot have a lien in favor of himself on his own property; *Litchfield* v. *Ballou*, 114 U.S. 190, 195; *Gould* v. *Day*, 94 U.S. 405, 413; and that the inferior interest in a chattel "necessarily merges in that which is absolute and unconditional, when both are united and held by the same individual." *Moral* v. *Dearborn*, 12 Gray (78 Mass.) 336, 338 (1859).[6]

IV. THE DESTRUCTION OF THE PETITIONERS' LIENS BY THE GOVERNMENT CONSTITUTED A TAKING UNDER THE FIFTH AMENDMENT ENTITLING THE PETITIONERS TO JUST COMPENSATION

Following the execution of the "Instrument of Transfer of Title . . ." on August 4, 1955 (R. 49-51), the Navy removed the subject property from the State of Maine to Naval Shipyards in New York, Philadelphia and Norfolk (R. 10-11). The boats were allegedly

[6] Cf. *Hinckley* v. *Johnson, State Tax Assessor*, 153 Me. 517, 529, 138 A. 2d 463, 465 (1958) a tax case wherein the retention of a shipbuilder's lien under the Maine statute was held inconsistent with a claim of the tax assessor that the same shipbuilder held title

completed at these Naval shipyards and, while much of the material was probably incorporated into the boats, there is some evidence that not all the materials were so used (R. 11). It would be extremely difficult, if not impossible, to trace and establish the ultimate disposition of each and every one of the items[7] which were removed by the defendant from the State of Maine and which items were subject to the petitioners' liens.

Upon the acquistion of title by the Government and the removal of the uncompleted vessels, supplies and materials from the State of Maine by the Government, the petitioners were divested of their liens. *Thibodo* v. *United States*, 187 F.2d 249, 254 (C.A. 9, 1951).

Under the Maine statute, the petitioners had liens on each vessel enforceable "by attachment within four days after it has been launched"; and on the materials furnished before they became part of the vessel "which may be enforced by attachment". Upon the taking of title by the Government and the removal of the uncompleted vessels and materials from the State of Maine, the "doors to recovery" on the liens were foreclosed to the petitioners. *Thibodo* v. *United States*, *supra*, at p. 254. The *in rem* remedy provided by the Maine statute and recognized by the Government in the subject contract (Discharge of Liens clause, R. 37) was no longer available to the petitioners. This was so, first, because it now seems well settled than an *in rem* proceeding against property to which the Government has title is not permitted because of the sovereign's immunity from suit, *United States* v. *Alabama*, 313 U.S. 274, 282; and second, because the removal of the uncompleted vessels and materials from the State of

[7] See footnote 1, supra.

Maine and the loss of their identity destroyed the petitioners' rights to enforce their liens.

> "The peculiar advantages which it [the Maine Statute] affords to a lien claimant . . . . that he may resort to the vessel on which the labor was performed, or for which the materials were furnished, without regard to . . . ownership . . ." *Scudder v. Balkam*, 40 Me. 291, 292-3 (1855).

were effectively taken from the petitioners by the Government's acts.

In the instant case, the Government provided no fund from which the claims of any lien holders could be satisfied. The *res* was removed from the State of Maine, its identity destroyed and no fund was provided to which the lien holders could look for satisfaction of their liens.

There can be no doubt that a lien on property is a valuable and substantive property right. *Louisville Bank v. Radford*, 295 U.S. 555, reh. den. 296 U.S. 661; *Security Bank v. Rindge*, 85 F.2d 557, 561, (C.C.A.-9, 1936), reh. den. 86 F.2d 3, 107 A.L.R. 1240, cert. den. 299 U.S. 613, reh. den. 300 U.S. 686. The right to retain the lien until the debt secured thereby is paid may not be taken from the creditor consistently with the Fifth Amendment. *Security Bank v. Rindge*, *supra*. It has been said that the word "property" is to be broadly construed for "The constitutional provision is addressed to every sort of interest the citizen may possess." *United States v. General Motors*, 323 U.S. 373, 378; Cf. Developments of the Law—Remedies against the United States, 70 Harv. L.R., 827, 879.

When the Government acquired title to the *res* and removed it from the State of Maine, providing no fund

for payment of the petitioners' liens, it "took" the petitioners' liens. Regardless of the option in the Government created by the contract to require Rice to give the Government title, the contract did not destroy the existing liens. On the one hand the Government was enforcing its option as a contracting party to acquire title, but it was in its sovereign capacity that it destroyed the right of enforcement of the liens. It is well established that when the Government enters into contracts, its rights and duties are governed by law applicable to private contracts. *Lynch* v. *United States*, 292 U.S. 571, 579. *United States* v. *Standard Rice*, *supra*.

As a contracting party, the Government had no right to take property free of the liens created by state statute. Its sole contract right to any priority status was in the progress payments clause. The Government's right to enforce its paramount lien was lost when it acquired title. The Government's actions in depriving the petitioners of their liens was the act of the sovereign. It is for this "taking" of their liens that the petitioners are entitled to just compensation.

In *Thibodo* v. *United States*, *supra*, it was stated that the plaintiff whose liens were rendered unenforceable by the Government's acquisition of land could:

> ". . . state his claim for relief based upon a deprivation of constitutional rights, by virtue of the 'taking' of his right to have his bonds discharged through foreclosure of the lien upon the land." (at p. 257).

The petitioners have been deprived by the Government of their right to have their liens satisfied through attachment of the materials, supplies and vessels.

It is no answer to the petitioners' argument to state, as the Government did in the court below, that the Government gained nothing by the "taking" because it incurred large sums in completing the contract. It is well established that the criterion for determining just compensation is the owner's loss. As stated by this Court in *United States* v. *Causby*, 328 U.S. 256, 261:

> "It is the owner's loss not the taker's gain, which is the measure of the value of the property taken. *United States* v. *Miller*, 317 U.S. 369."

In *Brooks-Scanlon Corp.* v. *United States*, 265 U.S. 106, 123, the Court said:

> "It is the property and not the cost of it that is protected by the Fifth Amendment."

As a practical matter, the Government was unjustly enriched at the expense of the petitioners, for the contractor's equity of $57,158.03 in the property (*supra*, pp. 26-27) was more than sufficient to pay the $23,732.72 claimed by petitioners (R. 5).

The Government has deprived the petitioners of their property rights. There are no remedies available to the petitioners other than the protection afforded them by the Fifth Amendment. It has been said that:

> ". . . where federally protected rights have been invaded, it has been the rule from the beginning that the courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell* v. *Hood*, 327 U.S. 678, 684.

CONCLUSION

The provisions of the Rice contract make it clear that the title to the uncompleted boats and materials were in Rice until it transferred title to the Government. Until the transfer of title was made, the sole title interest of the Government in the uncompleted boats and materials was its lien for the progress payments it had made. The petitioners had liens on the uncompleted boats and materials under a law of the State of Maine. When the Government acquired title to and possession of the uncompleted boats and materials from Rice, the Government made no provision for discharging or satisfying petitioners' liens. The action of the Government deprived the petitioners of their property rights (liens) and they are entitled to just compensation therefor.

It is respectfully requested that the judgment of the court below be reversed and that the court be directed to enter judgment for the petitioners in the amount which it determines is due to each petitioner.

Respectfully submitted.

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